Supreme Court, U. S.
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In The

Supreme Court of the United States

NO. 77-1015

RONALD PRATE, LEONARD LA ROSA, PATRICIA PLUMERI, PATRICIA A. DOYLE, THERESA YOUNG, TERRENCE P. ANDERSON, MICHAEL A. DI GIOVANNI, GARY GENNARINO, MICHAEL C. KELLER, CHARLES J. ZONA, JOSEPH P. TANTALO, MICHAEL PERRY, SAMUEL T. GERMANO, RONALD S. ZAVAGLIA, CAROL TSCHIDERER and THOMAS A. TSCHIDERER,

Petitioners,

vs.

ELISHA FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, NEW YORK; THOMAS HASTINGS, CHIEF OF POLICE OF THE CITY OF ROCHESTER POLICE DEPARTMENT; MEMBERS OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION; and EXECUTIVE DIRECTOR OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION,

Respondents,

vs.

JOHN HOWARD, JOHN WYCHE and JOHNNY SMITH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Opinions Below.	1
Questions Presented	3
Statement of the Case	4
Reasons for Denying the Petition	
I. Petitioners May Not Collaterally Attack The Final Judgment In the Howard Case . . .	12
II. Petitioners Failed To Comply With The Jurisdictional Prerequisites To A Title VII Action And Thus May Not Assert Claims Under That Statute . .	17
III. The Judgment On The Merits Of Petitioners' Claims Does Not Conflict With Rulings By Other Courts of Appeals . . .	19
IV. The Judgment Does Not Conflict With This Court's Decision In Washington v. Davis	25
Conclusion.	29

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Respondents John Howard, John Wyche and Johnny Smith submit this brief in opposition to petitioners' request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on October 20, 1977.

OPINIONS BELOW

The judgment of the United States

Court of Appeals for the Second Circuit, entered on October 20, 1977, affirmed the dismissal of the complaint by the United States District Court for the Western District of New York. The judgment of the United States Court of Appeals for the Second Circuit is attached to the Petition as Appendix D. The decision of the United States District Court for the Western District of New York is attached to the Petition as Appendix C and is reported at 430 F.Supp. 1373 (W.D.N.Y. 1977).

QUESTIONS PRESENTED

1. Whether a final judgment in a prior lawsuit may be collaterally attacked by petitioners who failed to file a timely intervention motion in the prior case.
2. Whether petitioners who failed to comply with the jurisdictional prerequisites to commencement of a Title VII action may nevertheless assert claims under that statute.
3. Whether the Second Circuit's judgment on the merits of petitioners' claims is consistent with the decisions of other Courts of Appeals.
4. Whether the Second Circuit's judgment is consistent with this Court's decision in Washington v. Davis.

STATEMENT OF THE CASE

On September 17, 1976, petitioners instituted these consolidated actions seeking to invalidate the terms of a final Order and Judgment entered on May 12, 1975, in a lawsuit entitled "John E. Howard, et al. v. Elisha Freedman, et al.," 74 Civ. 234 (W.D.N.Y.). Respondents are the public officials responsible for hiring applicants for positions as police officers in the Rochester Police Department. Additionally, three of the named plaintiffs in the Howard lawsuit -- John Howard, Johnny Smith and John Wyche -- intervened in the district court and are respondents in this proceeding.

A brief review of the Howard litigation is necessary to fully understand the issues presented in the Petition.

In 1974, John Howard and other individual and organizational plaintiffs commenced an action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq., ("Title VII") against the very defendants named in the present lawsuit. The complaint in Howard challenged a broad range of employment practices and policies relating to the initial hiring and promotion of police officers in the Rochester Police Department. Plaintiffs there contested utilization of (1) certain recruitment techniques; (2) entrance level and promotional examinations; (3) psychological examinations; (4) certain educational requirements; (5) background investigations; (6) height requirements; and (7) arrest and conviction record requirements. It was alleged that

these practices were used for a number of years despite the fact that they excluded a disproportionately higher number of minority candidates and were completely unrelated to job performance. Indeed, plaintiffs in Howard contended that such practices resulted in a police department which, at that time, employed only 26 (4%) black and Spanish-surnamed officers.

Following motions for class certification and preliminary relief and after completion of extensive discovery, the case was scheduled for trial. However, on the day trial was to commence, the parties agreed upon the terms for settlement of the lawsuit. Subsequently, the district court conducted a hearing pursuant to Rule 23(e) of the

Federal Rules of Civil Procedure to determine the fairness and propriety of the stipulation and, on May 12, 1975, entered an order incorporating the terms of the settlement agreement. The order provides, among other things, that (1) written examinations used by the Department shall be validated as required by federal guidelines; (2) the Department shall develop and implement a program for recruitment of minority persons; (3) the Department shall establish a goal of twenty-five percent (25%) minority employment; and (4) until the goal is reached, appointments shall be made pursuant to a specified hiring mechanism. It is expressly provided that the hiring mechanism is "a temporary measure pursuant to federal law designed to remedy the racially disproportionate impact

of prior employment practices." (Petition at B-8). Upon entry of the Order, the parties to the original Howard case began implementation of its provisions and, throughout the past two and one-half years, have worked together to ensure compliance with the mandate.

Thirteen months after the final order and Judgment were entered in Howard, nonminority individuals, including 14 of the 16 petitioners in the present action, applied for intervention in the Howard case and sought to reopen and invalidate the Order on the grounds that it discriminated against them. The district court denied the intervention application and, in so doing, stated:

> "The applicants for intervention [Petitioners] had ample notice of the pendency of this [Howard] lawsuit. Numerous articles appeared in the Rochester papers and notices were published in the local newspapers that a hearing would be held on the advisability of the proposed settlement of the action. The May 12, 1975 judgment and order was also widely publicized. If the applicants were truly disturbed by this judgment, they might have sought intervention at that time.
>
> Furthermore, to permit the applicants to reopen this lawsuit would result in unfair delays and consequences to the parties who have worked long and hard for the settlement and ultimate conclusion of this lawsuit." Howard v. Freedman, 74 Civ. 234 (W.D.N.Y. June 22, 1976).

Petitioners filed a notice of appeal from the order denying intervention but subsequently stipulated to dismissal of the appeal.

These same individuals then filed the instant actions seeking to accomplish the identical result -- invalidation of the final Howard order. Petitioners

moved for preliminary relief asserting, as they did on their unsuccessful intervention application, that the relief mandated by the Howard decree violates the Constitution and various Civil Rights Acts. On October 20, 1976, the district court denied plaintiffs' motion for a preliminary injunction. Subsequently, by decision and order, dated May 3, 1977, the Hon. John T. Curtin dismissed petitioners' complaint. 430 F.Supp. 1373 (W.D.N.Y. 1977). The court held that petitioners' challenge to the Howard Order constitutes an impermissible collateral attack on a prior final judgment. Moreover, the court held that even assuming petitioners could collaterally challenge the order at this late date, their complaints fail to state a claim upon which relief may be granted. The court determined that the final order in Howard was entered in full conformity with both federal law and the district court's equitable power to remedy the effects of the city officials' past discrimination against members of minority groups. Petitioners appealed from the order dismissing their complaints and, on October 20, 1977, the United States Court of Appeals for the Second Circuit affirmed without opinion.

Petitioners then filed the instant Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REASONS FOR DENYING THE PETITION

I

PETITIONERS MAY NOT COLLATERALLY ATTACK THE FINAL JUDGMENT IN THE HOWARD CASE

Petitioners instituted these consolidated actions seeking to enjoin defendants-respondents from a course of conduct which was mandated by the final order and judgment in the Howard case. Their complaint specifically requests injunctive relief which would not only prohibit further compliance with that order[1] but also invalidate prior action taken pursuant to the decree.[2] The instant litigation is an attack on the Howard order and seeks relief which would impair the rights of the parties to that prior lawsuit.

1 Prate Complaint at ¶27; Zavaglia Complaint at ¶21

2 Prate Complaint at ¶27-28; Zavaglia Complaint at ¶21.

The courts' determination that such a collateral challenge is impermissible is fully consistent with decisions by other federal courts. See Black and White Children of Pontiac School System v. School System of Pontiac, 464 F.2d 103 (6th Cir. 1972); Oburn v. Shapp, 70 F.R.D. 549 (E.D. Pa. 1976), aff'd 546 F.2d 418 (3d Cir. 1976), cert. denied, 97 S.Ct. 1650 (1977); United States v. City of Chicago, 395 F.Supp. 329, 336-37 (N.D. Ill.), aff'd 525 F.2d 695 (7th Cir. 1975); Construction Industry Combined Committee v. International Union of Operating Engineers, 67 F.R.D. 664 (E.D. Mo. 1975).

Plainly, petitioners misconstrued the proper remedy to protect whatever interests they may have had in the Howard litigation. They could have -- and should have -- filed a timely motion

to intervene in that proceeding. Rather petitioners waited until thirteen months after the Howard order was entered before applying for intervention.[3] The district court denied the intervention application as untimely[4] and, in so doing, found that petitioners had ample notice of the pendency of the Howard lawsuit and should have sought intervention at that time.[5]

3 Two of the petitioners did not even seek leave to intervene.

4 Howard v. Freedman, 74 Civ. 234 (W.D.N.Y. June 22, 1976).

5 The record in the Howard case further reveals that approximately one month after the Howard order was entered, the Civil Service Commission sent a letter to all candidates for the position of police officer, including the proposed intervenors in Howard. The letter carefully explained the terms of the Howard Order and invited candidates to inspect the Order in the office of the Civil Service Commission. Additionally, the letter requested each candidate to complete a form and return it to the Commission. (Affidavit of Daan Braveman, Esq., sworn to June 19, 1976). Despite this actual knowledge, the proposed intervenors (footnote cont'd on page 15).

Having failed to properly and promptly protect their rights, petitioners attempted to correct their error by filing the instant lawsuits. To permit petitioners to further challenge the Howard Order in a separate proceeding would subject the parties to the Howard case to the risk of inconsistent or contradictory judgments. Moreover, as the courts below correctly held, to allow such a collateral challenge would render meaningless the concept of final judgments and constitute a substantial interference with the orderly administration of justice. See

(footnote 5 cont'd)
waited nearly one year before applying for intervention in the Howard case. (This Court may take judicial notice of the record in the Howard case. National Fire Insurance Co. v. Thompson, 281 U.S. 331, 336 (1929)).

also, Rios v. Enterprise Association Steamfitters Local, 520 F.2d 352, 355-56 n.3 (2d Cir. 1975); Class v. Norton, 505 F.2d 123, 125 (2d Cir. 1974). In these circumstances, the district court correctly held that it lacked jurisdiction to entertain petitioners' collateral challenge to a final judgment entered in a prior case in which petitioners could have asserted their rights if they had acted in a timely fashion.

II

PETITIONERS FAILED TO COMPLY WITH THE JURISDICTIONAL PREREQUISITES TO A TITLE VII ACTION AND THUS MAY NOT ASSERT CLAIMS UNDER THAT STATUTE

Even assuming for the sake of argument that the district court could entertain petitioners' collateral challenge, it lacked jurisdiction to hear those claims which allegedly arise under Title VII.[6] The jurisdictional prerequisites to commencement of a Title VII action have been clearly stated by this Court. First, the party claiming to be aggrieved must file a timely charge with the Equal Employment Opportunity Commission. Second, the party must receive a notice of the right to sue and commence the court action within ninety days.

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6 42 U.S.C. §§2000e et seq.

Alexander v. Gardner-Denver Company, 411 U.S. 792, 798 (1973); 42 U.S.C. §2000e-5.

Once again, petitioners failed to utilize the proper procedures to protect their interests. Indeed, none of the sixteen petitioners complied with the statutorily mandated procedural requirements. In such circumstances, the district court lacked jurisdiction over petitioners' Title VII claims.[7]

7 While the district court did not decide on this basis (Petition, Appendix C-8), this Court may consider the absence of subject matter jurisdiction over the Title VII claims.

III

THE JUDGMENT ON THE MERITS OF PETITIONERS' CLAIMS DOES NOT CONFLICT WITH RULINGS BY OTHER COURTS OF APPEALS

Assuming petitioners could overcome the various procedural barriers to adjudication of their case, their challenge to the Howard order must nevertheless fail. The limited remedial relief mandated by the Howard order was a proper and, indeed, essential method for remedying the continuing effects of past discrimination against black and other nonwhite applicants for police positions. The courts below ruled that such relief violates neither the Constitution nor Title VII and the other Civil Rights Acts.[8] That determination does not conflict -- but rather is completely in

8 42 U.S.C. §1981; 42 U.S.C. §1983.

accord -- with the decisions by other Court of Appeals. See, e.g., E.E.O.C. v. American Telephone and Telegraph, 556 F.2d 167 (3d Cir. 1977), Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Boston Chapter N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); United States v. Masonry Contractors' Ass'n., 497 F.2d 871 (6th Cir. 1974); Morrow v. Chrisler, 491 F.2d 1063 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974); United States v. N. L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Local 86, 443 F.2d 544 (9th Cir.) cert. denied, 404 U.S. 984 (1971).[9]

9 Nor does the determination conflict with other decisions by the Second Circuit which has consistently upheld the temporary use of hiring mechanisms as a method for alleviating the effects of discrimination. See, e.g., Patterson v. (fn. cont'd)

Relying on Bakke v. Regents of University of California, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), cert. gr. 97 S.Ct. 1098 (1977), petitioners attempt to distinguish these cases by suggesting that the remedial relief directed in Howard was not based on a finding of past discrimination. (Petition at 17, 31). That suggestion is rather remarkable in view of the following language in the Howard order:

(fn. 9 cont'd)
Newspaper and Mail Deliverers' Union, 514 F.2d 767 (2d Cir. 1975); cert. denied sub nom. Larkin v. Patterson, 427 U.S. 911 (1976); Rios v. Enterprise Association Steamfitters Local, 501 F.2d 622 (2d Cir. 1974).

Moreover, if there is such a conflict -- as petitioners incorrectly assert -- the matter should be resolved by an en banc hearing rather than by Supreme Court review. F.R.A.P. 35. See Wisniewski v. United States, 351 U.S. 901, 902 (1957) (it is primarily the task of a Court of Appeals to reconcile its internal difficulties).

> "The hiring mechanism set forth in paragraphs 2 and 3 is a temporary measure pursuant to federal law to remedy the racially disproportionate impact of prior employment practices." (Petition at B-8) (emphasis added).

Thus Bakke has no application to the instant case. There, the California Supreme Court held that a minority sensitive program was invalid because it was not directed at prior discrimination by defendants. However, the court expressly observed that such relief is permissible if, as here, it is designed to remove the continuing injury resulting from defendants' previous racially discriminatory practices. Id. at 696, 553 P.2d at 1168.

Petitioners' assertion apparently is premised on the notion that remedial relief can be ordered only after a trial on the merits. (Petition at 22). However, such a notion fails to recognize

that the Howard case was a Title VII action and there is "great emphasis in Title VII to promote settlement." Oatis v. Crown Zellerbach Corporation, 398 F.2d 496, 498 (5th Cir. 1968). See Alexander v. Gardner-Denver Company, 415 U.S. 36, 44 (1974) (cooperation and voluntary compliance were selected as the preferred means for assuring equality of employment opportunitites).

Equally indefensible is petitioners' suggestion that the Howard relief is improper because they were "barred from participation at all levels in that case." (Petition at 26). Petitioners were barred from participating in the Howard litigation only as a result of their own inaction. Despite notice of the pendency of the Howard case and the

final order, petitioners did not attempt to assert their interest until long after final judgment. Accordingly, the courts below properly -- and in full conformity with decisions by other Court of Appeals -- found petitioners claims to be meritless.

IV

THE JUDGMENT OF THE SECOND CIRCUIT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN WASHINGTON v. DAVIS

Relying primarily on Washington v. Davis, 427 U.S. 229 (1976), petitioners argued below, and continue to assert in this Court, that subsequent "changes" in the law undermine the continued validity of the Howard order. (Petition at 28). A careful reading of Washington reveals that petitioners' contention is unsupportable and was properly rejected by the district court and court of appeals. This Court's decision in Washington discusses only the constitutional standard for adjudication of employment discrimination and does not apply to cases, such as Howard, which were brought under Title VII. Id. at 239. The standard which governed the Howard case was, and

remains, the one adopted by this court in Griggs v. Duke Power Company, 401 U.S. 424 (1971).[10]

Moreover, in Washington this court was not presented with, and did not discuss, any issue regarding the propriety of temporary remedial relief. If Washington has any application to the instant case, it would support the district court's decision to dismiss the complaints. To state a constitutional claim under Washington, petitioners must establish that the challenged hiring practices are the product of "an invidious discriminatory purpose." Id. at 242. That conclusion is foreclosed here since it is

10 Contrary to petitioner's argument (Petition at 30), this Court's decision in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) did not change the Griggs standard for evaluating Title VII claims.

undisputed that respondents are hiring pursuant to a federal court mandate, rather than any invidious purpose of discriminating against petitioners. See United Jewish Organizations v. Carey, 97 S.Ct. 997, 1017 (1977) (Stewart, J., concurring).

But, there exists an equally important reason for rejecting petitioners' claims even assuming that Washington changed existing Title VII law or somehow supports their position. The decision in Washington was rendered after entry of the Howard order. To allow these petitioners, as well as others, to reopen and relitigate a prior judgment because of a subsequent change in the law would prevent litigation from ever reaching a conclusion. As the Second Circuit said in Class v.

Norton, supra at 125, "[t]he efficient and fair administration of justice requires that litigation of a issue at some point come to an end."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that exercise of the Court's discretionary power of review is inappropriate in these circumstances. The merits of petitioners' underlying claims are not presented in a clear manner but rather are clouded by jurisdictional and procedural issues. Moreover, the judgment of the Second Circuit is in full conformity with decisions by this Court and by other Courts of Appeals. Accordingly, the Petition for Writ of Certiorari should be denied.

Dated: Rochester, New York
February 10, 1978

Respectfully Submitted,

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